

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JEANNIE MARIE WILSON**

Claimant

VS.

**GLORY DAYS, INC.**

Uninsured Respondent

AND

**KANSAS WORKERS COMPENSATION FUND**

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Docket No. 1,035,327

**ORDER**

Claimant requests review of the January 6, 2012 Order on Claimant's Motion for Civil Penalties entered by Administrative Law Judge Rebecca Sanders.

**APPEARANCES**

Frank D. Taff of Topeka, Kansas appeared for the claimant. Jerry Shelor, of Topeka, Kansas appeared for the Kansas Workers Compensation Fund. This matter was placed on the Board's Summary Calendar and was considered and determined without oral argument to the Board.

**RECORD AND STIPULATIONS**

The Board has considered the same record as that of the ALJ, including the transcript of Preliminary Hearing held on August 15, 2007, with exhibits, the transcript of Preliminary Hearing held on July 19, 2011, including exhibits, the transcript of Motion for Penalties hearing held on December 21, 2011, including exhibits, and the documents filed of record with the Kansas Division of Workers Compensation.

**ISSUES**

The Administrative Law Judge (ALJ) denied claimant's motion for civil penalties after finding that claimant did not make proper service on the Kansas Workers Compensation Fund (Fund) because it was served at the wrong address.

The claimant requests that this matter be remanded to the ALJ so that evidence may be presented that the Fund did receive the demand letter, and failed to act in a timely manner and so the ALJ can award civil penalties and attorney's fees, including those necessitated by this appeal.

The Fund argues that the ALJ's Order should be affirmed as claimant failed to provide proper service upon the Fund when she served "someone" at 401 Topeka Boulevard. That is not the address of the Kansas Insurance Department, the administrator of the Fund. The Fund further argues that, pursuant to the holding of the Kansas Court of Appeals in *Hall*<sup>1</sup> the Fund is not subject to penalties under K.S.A. 44-512a.

#### **ISSUES ON APPEAL:**

1. Whether there was substantial compliance by claimant with K.S.A. 44-512a;
2. Whether claimant was denied a fair hearing to present evidence on that issue;
3. Whether the Administrative Law Judge erred in finding that: "Claimant has not made proper service on the Kansas Workers Compensation Fund because it was served at the wrong address"; and
4. Whether the Administrative Law Judge erred denying civil penalties based upon such finding.

#### **FINDINGS OF FACT**

After reviewing the record compiled to date, the Board concludes the Order on claimant's motion should be affirmed.

Claimant is requesting penalties pursuant to K.S.A. 44-512a(a) for the Fund's failure to timely pay the preliminary award of the ALJ. Pursuant to the statute, service was made by certified mail<sup>2</sup> on the attorney for the Fund on September 20, 2011. This is not disputed. Service was attempted on the Fund on September 21, 2011, at 401 SW Topeka, Boulevard. No attempt was made to serve the uninsured respondent. A hearing was held on December 21, 2011, where the issue of the inadequate service of process on the Fund was raised. Claimant's attorney was provided the opportunity to present proof of the service obtained on the Fund. After the evidence of service of process and whether the service substantially complied with the statutory requirements were reviewed by the ALJ,

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<sup>1</sup> *Hall v. City of Hugoton*, 2 Kan. App. 2d 728, 587 P.2d 927 (1978).

<sup>2</sup> See: *Kelly v. Phillips Petroleum Co.*, 222 Kan. 347, 566 P.2d 101, (1997), which allows the use of certified mail in place of registered mail.

the ALJ determined that claimant had failed to comply with the requirements of the statute.

**PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 44-512a(a) states:

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount . . . for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill . . . .

K.S.A. 44-575(b)(c)(d)(e) states:

(b) For the purposes of providing for the payment of compensation for claims arising on and after July 1, 1974, and all other amounts required to be paid by any state agency as a self-insured employer under the workers compensation act and any amendments or additions thereto, there is hereby established the state workers compensation self-insurance fund in the state treasury. The name of the state workmen's compensation self-insurance fund is hereby changed to the state workers compensation self-insurance fund. Whenever the state workmen's compensation self-insurance fund is referred to or designated by any statute, contract or other document, such reference or designation shall be deemed to apply to the state workers compensation self-insurance fund.

(c) The state workers compensation self-insurance fund shall be liable to pay: (1) All compensation for claims arising on and after July 1, 1974, and all other amounts required to be paid by any state agency as a self-insured employer under the workers compensation act and any amendments or additions thereto; (2) the amount that all state agencies are liable to pay of the "carrier's share of expense" of the administration of the office of the director of workers' compensation as provided in K.S.A. 74-712 through 74-719, and amendments thereto, for each fiscal year; (3) all compensation for claims remaining from the self-insurance program which existed prior to July 1, 1974, for institutional employees of the division of mental health and retardation services of the department of social and rehabilitation services; (4) the cost of administering the state workers compensation self-insurance fund including the defense of such fund and any costs assessed to such fund in any proceeding to which it is a party; and (5) the cost of establishing and operating the state workplace health and safety program under subsection (f). For the purposes of K.S.A. 44-575 through 44-580, and amendments thereto, all state agencies are hereby deemed to be a single employer whose liabilities specified in this section are hereby imposed solely upon the state workers compensation self-insurance fund and such employer is hereby declared to be a fully authorized and qualified self-insurer under K.S.A. 44-532, and amendments thereto, but such employer shall not be required to make any reports thereunder.

(d) The secretary of administration shall administer the state workers compensation self-insurance fund and all payments from such fund shall be upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the secretary of administration or a person or persons designated by the secretary. The director of accounts and reports may issue warrants pursuant to vouchers approved by the secretary for payments from the state workers compensation self-insurance fund notwithstanding the fact that claims for such payments were not submitted or processed for payment from money appropriated for the fiscal year in which the state workers compensation self-insurance fund first became liable to make such payments.

(e) The secretary of administration shall remit all moneys received by or for the secretary in the capacity as administrator of the state workers compensation self-insurance fund, to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the state workers compensation self-insurance fund.

The State Workers Compensation Self-insurance Fund was created to provide legal representation for the state and to defend the state against claims brought by injured state employees. This claimant is not an employee of the State of Kansas. Claimant appears to confuse this agency with the Fund that is a party to this claim, the agency discussed below which steps into the shoes of an uninsured employer when a workers compensation claim is made against that employer.

Claimant, in her “Application For Review By Appeal Board” argues that this case is similar to *Hernandez*<sup>3</sup>. In *Hernandez*, the claimant served the attorney of record for the Kansas Health Policy Authority (KHPA), the agency in charge of administering the State Self-Insurance Fund, an agency created by the legislature to litigate and defend workers compensation claims brought by State employees for injuries suffered while working for the State. That fund is administered by the Secretary of Administration, the entity responsible for funding any liability due to an injury suffered by a state employed worker. This claimant is not an employee of the State of Kansas. Neither the KHPA, nor the State Self-Insurance Fund are involved in this litigation. K.S.A. 44-575 is not applicable to this litigation.

K.S.A. 44-566a(a) states:

(a) There is hereby created in the state treasury the workers compensation fund. The commissioner of insurance shall be responsible for administering the workers compensation fund, and all payments from the workers compensation fund shall be upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the commissioner of insurance or a person or persons designated by

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<sup>3</sup> *Hernandez v. State*, No. 105,059, 260 P3d. 102, 2011 WL 4444487. (Unpublished Court of Appeals opinion filed Sept. 23, 2011).

the commissioner. The commissioner of insurance annually shall report to the governor and the legislature the receipts and disbursements from the workers compensation fund during the preceding fiscal year.

K.S.A. 44-566a(e) states:

(e) The workers compensation fund shall be liable for:

(1) Payment of awards to handicapped employees in accordance with the provisions of K.S.A. 44-569, and amendments thereto, for claims arising prior to July 1, 1994;

(2) payment of workers compensation benefits to an employee who is unable to receive such benefits from such employee's employer under the conditions prescribed by K.S.A. 44-532a, and amendments thereto;

(3) reimbursement of an employer or insurance carrier pursuant to the provisions of K.S.A. 44-534a, and amendments thereto, subsection (d) of K.S.A. 44-556, and amendments thereto, subsection (c) of K.S.A. 44-569, and amendments thereto, and K.S.A. 44-569a, and amendments thereto;

(4) payment of the actual expenses of the commissioner of insurance which are incurred for administering the workers compensation fund, subject to the provisions of appropriations acts; and (5) any other payments or disbursements provided by law.

The legislature has appointed the Commissioner of Insurance to be the administrator of the Fund. The office of the Commissioner of Insurance is located at 420 SW 9<sup>th</sup> Street, Topeka, Kansas. The statute specifically orders that all payments from the Fund shall issue from the Commissioner of Insurance. There is no statutory connection between the Commissioner of Insurance and the Kansas Department of Labor and the Kansas Department of Labor does not administer or otherwise have supervisory control over the Fund.

For reasons unknown, claimant attempted to obtain service upon the Fund at 401 SW Topeka Boulevard. As was noted by the ALJ, this is not the address of the Fund. It is, instead, the address of the Kansas Department of Labor, which also offices the Kansas Workers Compensation Division. As noted above, there is no connection between the Fund and office of the Commissioner of Insurance with the Kansas Department of Labor.

At the hearing on claimant's Motion for Penalties, claimant's attorney argued that the service on the Fund attorney, coupled with that attorney's letter to the Fund alerting it to the Preliminary Order of the ALJ for temporary total disability compensation constitutes "substantial service".<sup>4</sup> Claimant argues that substantial service was accepted as adequate by the Supreme Court in *Kelly*. However, in *Kelly*, a certified letter was sent to the respondent/employer in care of it's attorney. Here, the attorney was served in his capacity

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<sup>4</sup> Motion for Penalties at 7 (dated Dec. 21, 2011).

as the Fund's attorney. But, there is no indication that service similar to that used in Kelly was attempted on the employer. The attempt to serve the employer was simply sent to the wrong address. Therefore, it cannot be found that service was effected on the employer in this situation. The finding by the ALJ that claimant failed to satisfy the requirements of K.S.A. 44-512a is affirmed.

Claimant contends that she was not allowed a fair hearing to present evidence regarding her compliance with K.S.A. 44-512a. However, a hearing was held on December 21, 2011, where claimant was allowed to provide proof of the service on the Fund. Evidence was gathered and the ALJ ruled on the effectiveness of the service. Based upon the evidence provided, it was clear that service was effected on the wrong agency at the wrong address. Claimant made no proffer of additional evidence nor identified any witnesses it wished to call to testify. The record fails to disclose that claimant was denied a fair hearing or due process of law.

Finally, the Kansas Court of Appeals, in *Hall*, held that the Kansas Workers Compensation Fund, the entity claimant was attempting to serve, cannot be assessed penalties under K.S.A. 44-512a as that statute specifically identifies the employer or insurance carrier as being "liable for such compensation".<sup>5</sup> *The Hall* court went on to conclude that the "legislature's omission of the fund from the provisions of 44-512a was intentional".<sup>6</sup> Therefore, any attempt to assess penalties against the Kansas Workers Compensation Fund under K.S.A. 44-512a is merely an exercise in futility. A mandamus action could provide claimant with a remedy against the Fund, or perhaps a referral to Fraud and Abuse under K.S.A. 44-5,120.

### **CONCLUSIONS**

Claimant failed to satisfy the service requirements of K.S.A. 44-512a. Therefore, the Order of the ALJ denying claimant's request for penalties is affirmed.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Rebecca Sanders dated January 6, 2012, is affirmed.

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<sup>5</sup> *Hall v. City of Hugoton*, 2 Kan. App. 2d 728, 730, 587 P.2d 927 (1978).

<sup>6</sup> *Id.*

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant  
Jerry Shelor, Attorney for the Workers Compensation Fund  
Rebecca Sanders, Administrative Law Judge